Filed 4/1/10 P. v. Jeter CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RENEISHA JETER, Defendant and Appellant.	A123432 (San Francisco County Super. Ct. No. FCR204739)

Defendant Reneisha Jeter appeals the restitution order imposed by the trial court following her guilty-plea conviction on the charge of second degree burglary in violation of Penal Code, section 459, subdivision (a).[1] Defendant contends the trial court erred by imposing restitution relating to dismissed charges in the absence of a *Harvey* waiver.[2] Concluding that defendant's contention has merit, we remand for further proceedings consistent with the views expressed below.[3]

FACTUAL AND PROCEDURAL BACKGROUND

On or about December 13, 2007, a felony complaint was filed in case number 2358426 charging defendant and three codefendants with second degree commercial

---

1 Further statutory references are to the Penal Code unless otherwise stated.

2 *People v. Harvey* (1979) 25 Cal.3d 754, 757-759 (*Harvey*).

3 On February 18, 2010, we ordered the parties to submit supplemental briefs on the issue of whether this appeal should be dismissed for failure to obtain a certificate of appealability pursuant to section 1237.5. Upon receipt of the parties' briefs, and further consideration of the issue, we are satisfied the appeal may proceed without a certificate of probable cause.

burglary (§ 459) and grand theft (§ 487, subd. (a)) relating to an incident at the Bebe store on Union Street on or about September 24, 2007 (counts 1 and 2 respectively); second degree commercial burglary and grand theft relating to an incident at the Coach Store on Clay Street on or about September 26, 2007 (counts 3 and 4 respectively); and, second degree commercial burglary and grand theft relating to an incident at the Bebe store on 20th Avenue on or about November 6, 2007 (counts 5 and 6 respectively).

A warrant for defendant's arrest was issued in connection with the felony complaint. The warrant states that in each of the three incidents a group of young people entered the store in question, took merchandise off the racks and fled the store en masse without paying. Defendant was identified as one of the group from footage of the incidents captured on each store's video surveillance camera.

Defendant was apparently also charged in a separate matter (case number 2358427) with offenses arising from a similar grab-and-run incident at the Solstice Sunglasses store in the Embarcadero Center on October 3, 2007. No documentation pertaining to case number 2358427 appears in the appellate record for this case.

At a hearing on March 20, 2008, and after a knowing and voluntary waiver of her constitutional rights, defendant entered a guilty plea in case number 2358426 on count 1 (second degree commercial burglary in violation of section 459 relating to the incident at the Bebe store on Union Street on or about September 24, 2007). Defendant entered her guilty plea pursuant to negotiated disposition in which the People agreed to a probationary sentence and moved to dismiss the remaining counts in case number 2358426 and to dismiss case number 2358427 in its entirety. The trial court granted the People's motion to dismiss.

A sentencing hearing was held on April 11, 2008. On defendant's plea of guilty to count 1 in case number 2358426, the trial court suspended imposition of sentence and placed defendant on probation for a period of three years. As conditions of her probation, defendant was ordered to serve six months in county jail with credit for 37 actual days served in custody and to make restitution to Coach, Solstice Sunglasses and Bebe. The trial court stated that "Coach has claimed $3,530, Solstice . . . $64,000 and Bebe

$10,000." Defense counsel then requested that the trial court set a hearing on the issue of restitution because the amounts requested "seem[ed] high."

Subsequently, a restitution hearing was held on October 28, 2008. At the hearing, Cynthia Lewis testified that she works in retail loss prevention for Coach Leatherwear and investigates non-employee thefts at Coach stores. Lewis testified that an incident report prepared in connection with a theft at the Coach store in the Embarcadero Center on September 26, 2007, reported goods stolen valued at $4,524.[4] Thomas Cowen testified that he is a Loss Prevention Manager with Solstice Marketing Concepts, a company selling fashion sunglasses. Cowen testified that a theft occurring at the Solstice store in the Embarcadero Center on October 3, 2007, resulted in a loss of 161 frames valued at approximately $50,000.[5] Michael Wolfson testified that he is the manager of loss prevention operations for Bebe Stores, a women's specialty retailer. Wolfson testified that the theft occurring on September 24, 2007 at the Bebe store on Union Street resulted in a loss of $3,500, and that the theft occurring on November 6, 2007 at the Bebe store at the Stonestown Mall on 20th Avenue resulted in a loss of $7,000.[6]

On the basis of the evidence and testimony presented, the trial court awarded restitution to Coach Leatherwear in the amount of $4,524, restitution to Bebe Stores in the amount of $9,800 for both incidents, and restitution to Solstice in the amount of $45,000. The court also ordered that defendants were jointly and severally liable for the

---

[4] This loss amount relates to counts 3 and 4 in case number 2358426 (second degree commercial burglary and grand theft relating to an incident at the Coach Store on Clay Street on or about September 26, 2007). Counts 3 and 4 were dismissed pursuant to the plea agreement.

[5] This loss relates to the separate matter in case number 2358427 that was dismissed pursuant to the plea agreement in case number 2358426.

[6] These loss amounts relate to counts 1, 2, 5 and 6 in case number 2358426. The loss of $3,500 pertains to the September 24 incident at Bebe on Union Street underlying counts 1 and 2 and the amount of $7,000 pertains to the November incident at Bebe on 20th Avenue underlying counts 5 and 6. Counts 2, 5 and 6 were dismissed pursuant to the plea agreement.

restitution owed in the total amount of $59,524. Defendant filed a timely appeal of the restitution order on November 6, 2008.

DISCUSSION

Defendant contends that in the absence of a *Harvey* waiver the trial court erred by imposing restitution based on counts or charges that were dismissed pursuant to the plea agreement. Defendant argues that because no *Harvey* waiver was obtained at the change of plea hearing as required under section 1192.3, the trial court was limited to imposing a restitution order only with respect to the September 24, 2007 incident at the Bebe Store on Union Street underlying her guilty plea on count 1.

Preliminarily, we address the applicability of section 1192.3. Section 1192.3 states: "(a) A plea of guilty or nolo contendere to an accusatory pleading charging a public offense, other than a felony specified in Section 1192.5 or 1192.7, *which public offense did not result in damage for which restitution may be ordered*, made on the condition that charges be dismissed for one or more public offenses arising from the same or related course of conduct by the defendant *which did result in damage for which restitution may be ordered*, may specify the payment of restitution by the defendant as a condition of the plea or any probation granted pursuant thereto, so long as the plea is freely and voluntarily made, there is factual basis for the plea, and the plea and all conditions are approved by the court[;] (b) If restitution is imposed which is attributable to a count dismissed pursuant to a plea bargain, *as described in this section*, the court shall obtain a waiver pursuant to People v. Harvey (1979) 25 Cal.3d 754 from the defendant as to the dismissed count." (*Ibid* [italics added].)

Section 1192.3, subdivision (b) by its own terms applies only to plea bargains "as described in this section," i.e., section 1192.3, subdivision (a). Section 1192.3, subdivision (a) does not apply to all plea bargains. Rather, section 1192.3, subdivision (a) states unambiguously that it only applies where a defendant pleads guilty to an offense "*which . . . did not* result in damage for which restitution may be ordered."

In this case, however, defendant pleaded guilty to an offense which *did* result in damage for which restitution may be ordered. Thus, defendant's plea bargain does not

fall within the plain meaning of section 1192.3, subdivision (a). (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1126 ["The statute's plain meaning controls the court's interpretation unless its words are ambiguous. (Citation.)"].) Accordingly, *Harvey* waiver language in section 1192.3, subdivision (b) does not apply here and the trial court was not under a statutory duty to obtain an explicit *Harvey* waiver before imposing restitution on dismissed counts.

Nevertheless, the *Harvey* decision itself still applies.[7] *Harvey* requires an "agreement" before any adverse consequences may result by reason of the facts underlying and solely pertaining to a dismissed count. (*Harvey, supra,* 25 Cal.3d at p. 758.) Thus, the question here is whether there was an agreement that restitution could be imposed as to a dismissed count. (See *People v. Munoz* (2007) 155 Cal.App.4th 160, 166-167 [stating that "[a] *Harvey* waiver permits the sentencing court to consider the facts underlying dismissed counts and enhancements when determining the appropriate disposition for the offense or offenses of which the defendant stands convicted"].)

At the change of plea hearing, defense counsel recited the terms of the plea agreement. During that recitation, defense counsel stated: "This plea is offered as a result of discussions with the district attorney. And I've informed Ms. Jeter that the indicated sentence is imposition of sentence will be suspended. [¶] She'll be placed on formal probation to the adult probation department for a period of three years under the following terms and conditions:" At this juncture, the following colloquy ensued:

"Prosecutor: Can we have a stay-away [order] from Solstice Sunglasses at Embarcadero as well as Bebe in Stonestown mall?

Court: Ms. Jeter wasn't part of the Coach group?

---

[7] In *Harvey*, the California Supreme Court held that implicit in any plea bargain "is the understanding (*in the absence of any contrary agreement*) that defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, [a] dismissed count." (*Harvey, supra,* 25 Cal.3d at p. 758 [italics added].) " 'This "contrary agreement" proviso is what has since been called a "*Harvey* waiver." ' (Citation.)" (*People v. Draut* (1999) 73 Cal.App.4th 577, 580, fn. 2.)

Prosecutor: Well, she was part of the Coach. She was part of all of them actually, so should I do the stay away for all of them?

Court: Yes.

Prosecutor: So that would be for the Bebe at 2995 Union Street, the Bebe in Stonestown mall, the Solstice at Embarcadero, the Coach at Embarcadero, and that's it.

Court: You understand the other case is going to be dismissed, the Coach case, but staying away from Coach will be a condition of this one?

Defendant: Yes, your honor.

Court: Okay.

Defense counsel: She's to submit to a DNA sample pursuant to 296 of the Penal Code. [¶] Pay restitution. You have the determined number yet?

Prosecutor: I don't have the number.

Court: One of the presentence reports this morning said like $1,900 to Solstice, then another one said 10,000, so I don't think we know.

Prosecutor: Right. I think part of it was they are looking at the area where the particular person was taking glasses, and assigning - - - well, they know what area if those were Diors or Channels, Fendi or whatever, then assigning a value, approximate value.

Defense counsel: Okay, she's to pay restitution as determined by the adult probation department. You have a right to a hearing as to the amount of restitution if that comes to be an issue."

This record simply cannot support a finding that defendant *agreed* to pay restitution to all victims, that is to say, to pay restitution on the dismissed counts. Rather, the record shows that defendant pleaded guilty only to count 1 in return for the dismissal of all other counts, and that she agreed "to pay restitution as determined by the adult probation department." Nothing in the record indicates that defendant's agreement to pay restitution related to any count other than the count of conviction (count 1). Thus, in the absence of a "contrary agreement" that defendant's restitution obligation extended to

dismissed counts, the trial court committed sentencing error by imposing restitution on those counts. (See *Harvey, supra,* 25 Cal.3d at p. 758.)

Respondent's assertion to the contrary is unavailing. Respondent relies on the teachings of *People v. Carbajal* (1995) 10 Cal.4th 1114 (*Carbajal*) and *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*) for the proposition that restitution can be imposed as a condition of probation for damages underlying dismissed offenses, uncharged offenses, and offenses resulting in acquittal so long as the restitution award is "reasonably related either to the crime of which the defendant is convicted or to the goal of deterring future criminality." (*Carbajal, supra,* 10 Cal.4th at p. 1123; see also *Lent, supra,* 15 Cal.3d at pp. 486-487.)

The crucial distinction between *Carbajal/Lent* and the case at bar, however, is that those cases did not involve a sentence imposing restitution on counts dismissed pursuant to a plea bargain. Thus, whereas in *Lent* the California Supreme Court affirmed a judgment imposing, as a condition of probation, restitution of funds involved in a related criminal charge of which defendant was acquitted, the defendant there was sentenced for grand theft following a conviction after a jury trial. (*Lent, supra,* 15 Cal.3d at pp. 483, 486-487.) In *Carbajal,* the defendant entered a plea of no contest to the charge that he violated Vehicle Code section 20002, subdivision (a), by colliding with another vehicle and leaving the scene of the accident without supplying his identifying information. (*Carbajal, supra,* 10 Cal.4th at p. 1119.) Under those circumstances, the Supreme Court concluded that the trial court could order defendant to pay restitution, as a condition of probation, to the owner of the vehicle damaged by defendant in the accident. (*Carbajal, supra,* 10 Cal.4th at p. 1126-1127.) Neither *Lent* nor *Carbajal* involved a challenge to restitution imposed on counts dismissed pursuant to a plea bargain. Therefore, they do not control the issue of whether restitution can be imposed on counts dismissed pursuant to a plea bargain absent a *Harvey* waiver. Accordingly, we decline to rely on *Carbajal/Lent* in order to nullify the requirement for a *Harvey* agreement when a sentence imposed pursuant to a plea bargain includes restitution on dismissed counts.

DISPOSITION

The restitution order is reversed and the matter remanded for resentencing consistent with the views expressed in this opinion.

_____
Jenkins, J.

We concur:

_____
Pollak, Acting P. J.

_____
Siggins, J.